No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN, PETITIONER

v.

STATE OF MONTANA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Sixth Amendment's Speedy Trial Clause provides a convicted defendant with a right to a speedy sentencing.

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4 William Blackstone, *Commentaries on the Laws of England* (1769) 15, 28

Arthur W. Campbell, *Law of Sentencing* (3d ed. 2004) 17

1 Joseph Chitty, *A Practical Treatise on the Criminal Law* (1819) 25, 27, 28, 29

1 Edward Coke, *The Second Part of the Institutes of the Laws of England* (1797) 25, 26

2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* (2d ed. 1891) 26

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INTEREST OF THE UNITED STATES

This case presents the question whether the Sixth Amendment's Speedy Trial Clause applies to claims of impermissible delay between conviction and sentencing. The Court's resolution of that issue will apply to similar claims in federal prosecutions. Accordingly, the United States has a significant interest in the case.

STATEMENT

1. In December 2011, petitioner twice failed to appear in Montana state court to be sentenced for a felony domestic assault conviction. Pet. App. 2a; see Resp. Br. 2. The court issued a warrant for petitioner's arrest, and the State subsequently charged him with bail jumping. Pet. App. 2a.

In March 2012, the court sentenced petitioner on the domestic assault conviction to five years of imprisonment. Pet. App. 2a. He was remanded to begin

serving his sentence in a local detention center, pending resolution of the bail jumping charge. *Ibid.*

On April 19, 2012, petitioner pleaded guilty to bail jumping. Pet. App. 2a-3a. The same day, the State gave notice that it intended to designate him a "persistent felony offender" for sentencing purposes. *Id.* at 3a. Shortly thereafter, petitioner objected to the designation. On November 27, 2012, after briefing, the court denied petitioner's objection. *Ibid.*; Resp. Br. App. 2.

Meanwhile, on May 3, 2012, the court ordered a presentence investigation report (PSR). Pet. App. 3a. On October 10, 2012, the court received the PSR. *Ibid.*; see J.A. 93-94. The court scheduled the sentencing hearing for January 17, 2013, approximately nine months after petitioner pleaded guilty. Pet. App. 3a.

On January 17, 2013, rather than proceeding to sentencing, petitioner instead moved to dismiss the bail jumping charge, arguing that the delay in sentencing violated his rights under the Sixth Amendment's Speedy Trial Clause. Resp. Br. 4; Pet. App. 3a. The court postponed sentencing to permit the parties to brief the issue. Pet. App. 3a. In March 2013, the parties asked the court to schedule a sentencing hearing. *Ibid.* The court responded that other cases prevented it from expediting the sentencing. *Id.* at 3a-4a. On April 23, 2013, the court denied petitioner's motion to dismiss. *Id.* at 26a-37a.

On May 6, 2013, petitioner moved for reconsideration. Pet. App. 4a. In a supporting affidavit, he asserted, as relevant here, that: (i) at the local jail, he was unable to complete rehabilitation programs that were a required component of his sentence on the

assault conviction; and (ii) he was experiencing anxiety as a result of the delay. *Ibid.*; see J.A. 86-89. On June 18, 2013, the court denied the motion. Pet. App. 24a-25a.

On June 27, 2013—approximately 14 months after petitioner pleaded guilty—the court sentenced petitioner to seven years of imprisonment, with four years suspended, to run consecutively to the sentence imposed on the assault conviction. Pet. App. 4a. Because petitioner was already serving his domestic assault sentence while awaiting sentencing on the bail jumping conviction, the court did not credit that time towards the bail jumping sentence. J.A. 111, 114.

2. The Montana Supreme Court affirmed. Pet. App. 1a-23a.

The court first held that the Speedy Trial Clause does not apply to delay that occurs after conviction and before sentencing because "the major concerns of the speedy trial right * * * do not apply after conviction." Pet. App. 15a; see *id.* at 7a-19a.

The court reasoned that the Speedy Trial Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial," identifies "the protections due in the context of a '*trial*.'" Pet. App. 10a. The court explained that the trial is a distinct stage of the proceeding from sentencing. *Id.* at 8a-9a. The court further explained that the interests that the constitutional speedy trial right is designed to protect—preventing unreasonable pretrial detention, minimizing anxiety, and limiting prejudice to the defense—are not implicated after the defendant has been found guilty. *Id.* at 11a-14a (discussing *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972)).

The Montana Supreme Court next held that the Due Process Clause protects against pre-sentencing delay. Pet. App. 15a (citing *United States* v. *MacDonald*, 456 U.S. 1, 8 (1982)). Relying on this Court's decisions holding that the Due Process Clause guards against prejudicial delays that do not implicate the Speedy Trial Clause, the Montana Supreme Court held that whether a particular period of sentencing delay violates due process turns on "the reasons for the delay" and "the prejudice to the defendant." *Id.* at 17a (citing, among other cases, *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977)).

Applying those principles, the court held that the delay here did not violate the Due Process Clause. The court viewed the 14-month delay as primarily attributable to the trial court's institutional delays but nonetheless "unacceptable." Pet. App. 20a. The court concluded, however, that petitioner had not shown "substantial and demonstrable" prejudice. *Id.* at 21a. The court stated that petitioner's "claims of prejudice are speculative, concerning anticipated benefits or participation in various [Department of Corrections] programs, anticipated dates for conditional discharge, and anticipated enrollment in rehabilitation services." *Id.* at 22a. The court also rejected petitioner's assertion that his anxiety constituted prejudice, reasoning that petitioner was "unquestionably going to serve a sentence, and only waiting to learn how long" it would be. *Ibid.* In view of petitioner's failure to show prejudice, the court held that petitioner had not established a due process violation. *Ibid.*

SUMMARY OF ARGUMENT

The Speedy Trial Clause of the Sixth Amendment does not govern delays in sentencing a convicted de-

fendant. Rather, such delays should be analyzed under the Due Process Clause.

A. In determining the phases of a criminal prosecution to which Sixth Amendment rights apply, this Court has construed the Amendment's text in light of the purposes of a particular right and historical practice. This Court has long held that the Speedy Trial Clause safeguards the presumption of innocence by minimizing the deprivations that an unresolved accusation of criminal wrongdoing inflicts on a defendant. See, *e.g.*, *Barker* v. *Wingo*, 407 U.S. 514, 532-533 (1972). Specifically, the Clause guards against three types of deprivations: lengthy pretrial detention, extended anxiety and disruption, and impairment of the ability to defend against the charges. *Ibid.* The principle animating the Clause, therefore, is that delays in resolving the criminal charge can burden the defendant's freedom, weigh on his mind, and diminish his ability to defend against the charges at trial. Relying on the purposes of the Clause, the Court has held that a defendant may prevail in some cases without establishing particularized prejudice and that the only remedy for a Speedy Trial Clause violation is dismissal of the charges.

B. The Speedy Trial Clause's concerns have no application once the accusation has been resolved by trial and conviction, and the defendant is no longer presumed innocent. The Clause protects the accused, not the convicted. After conviction, a defendant generally has no protected interest in avoiding incarceration before sentencing, nor any expectation of avoiding anxiety concerning his sentence. And presentencing delay does not presumptively impair the reliability of sentencing determinations, in light of the

circumscribed, discretionary nature of the sentencing proceeding. Given those fundamental distinctions from the pretrial period, defendants would receive an unjustified windfall if courts were to presume prejudice and remedy any unreasonable sentencing delay by vacating validly obtained convictions.

C. The historical understanding of the Speedy Trial Clause supports the conclusion that it does not apply to sentencing delay. The right to a speedy trial arose out of the need to protect accused defendants against extended detention without an adjudication of guilt. Once the defendant had received that adjudication and had been found guilty, he had no remaining liberty interest in avoiding incarceration during any interval between conviction and sentencing. And while nineteenth-century authorities recognized that sentencing delays could occur, petitioner has proffered no evidence that such delays were ever thought to raise speedy trial concerns.

D. Although the Speedy Trial Clause does not apply to sentencing delay, defendants have ample protections against such delay. Federal and state statutes and rules prohibit unnecessary delays in sentencing. In addition, the Court has held that the Due Process Clause protects defendants against unreasonable delays, such as pre-indictment delay, that do not implicate the Speedy Trial Clause. See *United States* v. *Marion*, 404 U.S. 307, 324 (1971). The due process analysis is better suited to the sentencing context than the Speedy Trial Clause, as it requires a showing of actual prejudice, and courts have flexibility to fashion a remedy that addresses that prejudice. Indeed, in order to apply the Speedy Trial Clause to sentencing delay in a manner that avoids disproportionate re-

sults, the Court would need to alter the speedy trial framework to resemble the due process analysis. Rather than undertaking that project, the logical course is simply to apply due process principles to post-conviction, pre-sentencing delay.

ARGUMENT

THE SPEEDY TRIAL CLAUSE DOES NOT APPLY TO DELAYS IN SENTENCING A CONVICTED DEFENDANT

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; * * * and to have the [a]ssistance of [c]ounsel for his defence." U.S. Const. Amend. VI. In determining the phases of the criminal proceeding to which each right set forth in the Sixth Amendment applies, this Court has construed the Amendment's text in light of the purposes served by, and the historical understanding of, the right in question. See, *e.g.*, *United States* v. *Marion*, 404 U.S. 307, 320-321 (1971) (speedy trial right); see also, *e.g.*, *United States* v. *Gouveia*, 467 U.S. 180, 187-189 (1984) (right to counsel); *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984) (public trial right).

The Court has concluded, for instance, that the right to a speedy trial attaches upon arrest, when the defendant is first subject to a public accusation. *Marion*, 404 U.S. at 313. That follows from the Sixth Amendment's reference to "the accused," construed in light of the Speedy Trial Clause's core purpose of protecting presumptively innocent defendants from the harms inflicted by the accusation, as well as the right's history. *Id.* at 320-321. The Court has held

that other Sixth Amendment rights attach at different points in the process based on their distinct purposes. See, *e.g.*, *Gouveia*, 467 U.S. at 188-189 (right to speedy trial and right to counsel attach at different stages because they address different concerns). For example, the jury trial right applies to the elements of the offense that determine guilt and the statutory sentencing range—but not to punishment-related facts that bear on the exercise of discretion at sentencing. See, *e.g.*, *Alleyne* v. *United States*, 133 S. Ct. 2151, 2163 (2013). These decisions show that Sixth Amendment rights, despite their textual interconnectedness, are not completely coextensive in application. The variation reflects the primacy of the specific right's purposes and history in determining its scope.

The Speedy Trial Clause does not apply to delay that occurs after conviction and before sentencing. That delay does not implicate the core purposes of the speedy trial right. That right protects the presumption of innocence by minimizing the restraints on liberty imposed by an unresolved accusation of criminal wrongdoing and safeguarding the defendant's ability to prove his innocence at trial. See *Marion*, 404 U.S. at 313; see also *Barker* v. *Wingo*, 407 U.S. 514, 532-533 (1972). Once the defendant has been convicted, he is no longer presumed innocent, and he no longer possesses the liberty interests of the untried defendant. Delays that occur after conviction and before sentencing therefore do not implicate the harms with which the Speedy Trial Clause is concerned. And history confirms that analysis. As a result, it is the Due Process Clause, not the Speedy Trial Clause, that protects against unreasonable delays in sentencing.

A. The Speedy Trial Clause Protects The Presumption Of Innocence By Minimizing The Deprivations Caused By An Unresolved Accusation Of Crime

1. The Speedy Trial Clause safeguards the interests of presumptively innocent defendants

This Court has long held that the "major evils protected against by the speedy trial guarantee" are the deprivations that an unresolved public accusation of criminal wrongdoing inflict on a presumptively innocent defendant. *Marion*, 404 U.S. at 320; see *United States* v. *MacDonald*, 456 U.S. 1, 8 (1982) (the Speedy Trial Clause protects against the "disruption of life caused by arrest and the presence of unresolved criminal charges"); *Dickey* v. *Florida*, 398 U.S. 30, 37-38 (1970) (speedy trial right is "rooted * * * in the need to have charges promptly exposed," and preserves an accused's "right to a prompt inquiry into criminal charges"); see also *Doggett* v. *United States*, 505 U.S. 647, 663 (1992) (Thomas, J., dissenting) ("The touchstone of the speedy trial right * * * is the substantial deprivation of liberty that typically accompanies an 'accusation.'").

The "underpinning[]" of the Speedy Trial Clause is the recognition that a criminal charge "is a public act that may seriously interfere with the defendant's liberty." *Marion*, 404 U.S. at 320. While it is inevitable that the defendant will be subjected to that interference for the time it takes to resolve the criminal charges, the Clause seeks to minimize the harm to the defendant by forbidding unreasonable delay. *Ibid.* The court may therefore find a Speedy Trial Clause violation by weighing the length of and reasons for the delay, the defendant's assertion of his rights, and prejudice to the defendant. *Barker*, 407 U.S. at 530-

533. Prejudice takes three primary forms: the unresolved accusation may result in "oppressive pretrial incarceration"; it may cause "anxiety and concern" on the part of the accused; and it may impair the defendant's ability to present an effective defense. *Id.* at 532; see *Marion*, 404 U.S. at 320; *United States* v. *Ewell*, 383 U.S. 116, 120 (1966).

The Speedy Trial Clause seeks to minimize those deprivations. See *Barker*, 407 U.S. at 532-533. Lengthy pretrial detention burdens the accused's interests by forcing him, before trial, to bear essentially the restraints that, after conviction, would constitute punishment for the offense. *Id.* at 532; cf. *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951) ("Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").[1] Even when the defendant is free on bail, the unresolved charges constrain his liberty by "disrupt[ing] his employment, drain[ing] his financial resources, curtail[ing] his associations, sub-

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[1] The restriction on liberty from pretrial detention does not, of course, amount to punishment. See *United States* v. *Salerno*, 481 U.S. 739, 747 (1987) (explaining that detention under the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, is "regulatory" rather than punitive). Nor does the presumption of innocence apply "to a determination of the rights of a pretrial detainee during confinement before his trial has ever begun." *Bell* v. *Wolfish*, 441 U.S. 520, 533 (1979). Nevertheless, the Speedy Trial Clause responds to the practical burdens that an unresolved accusation imposes on the accused awaiting trial. See *Ewell*, 383 U.S. at 120 (speedy trial "guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself").

ject[ing] him to public obloquy, and creat[ing] anxiety in him." *Marion*, 404 U.S. at 320. The third form of potential prejudice—impairment of the defense—is also inconsistent with the interests of the defendant and of society in a reliable adjudication. *Barker*, 407 U.S. at 519-521. When excessive delay impairs the defendant's ability to rebut the charges, the trial may be rendered less reliable. See *id.* at 532 ("[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system."); cf. *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976) ("To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process.").

While "[i]mposing those consequences on anyone who has not yet been convicted is serious," it is "especially unfortunate to impose them on those persons who are ultimately found to be innocent." *Barker*, 407 U.S. at 533. The Speedy Trial Clause therefore "safeguards" the presumption of innocence by ensuring that the defendant is not subject to the burden of pending charges for an unreasonable amount of time. *Smith* v. *United States*, 418 F.2d 1120, 1123 (D.C. Cir.) (Wright, J., concurring in part and dissenting in part), cert. denied, 396 U.S. 936 (1969); see *Marion*, 404 U.S. at 313; *Smith* v. *United States*, 360 U.S. 1, 10 (1959).

2. The Court has construed the scope of the speedy trial right in light of its purpose

The Court has interpreted the stages at which the Speedy Trial Clause applies, and the scope of its protections, in light of its purpose of minimizing the harms caused by unresolved criminal charges.

First, the Court has held that the speedy trial right does not attach until the defendant has been arrested or otherwise "accused." U.S. Const. Amend. VI. Because the Speedy Trial Clause is directed specifically to the "substantial[] impairment of liberty * * * caused by arrest and the presence of unresolved criminal charges," *MacDonald*, 456 U.S. at 8, the Clause guards against only the "actual restraints imposed by arrest and holding to answer a criminal charge," *Marion*, 404 U.S. at 320. Before an individual is publicly accused, he "suffers no restraints on his liberty," and "his situation does not compare with that of a defendant who has been arrested and held to answer." *Id.* at 321. Similarly, the Clause does not apply once charges are dismissed, even if the defendant is aware that the charges might be reinstated and is therefore still subject to "stress, discomfort, and * * * disruption." *MacDonald*, 456 U.S. at 9.

Second, when the Clause does apply, the requirements for establishing a violation and the remedy for such violations reflect the Clause's focus on protecting the presumption of innocence. Thus, when a defendant demonstrates that the length of and reason for the delay are particularly unreasonable, "affirmative proof of particularized prejudice" to his defense in those proceedings "is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655; see *Barker*, 407 U.S. at 532. The Court has recognized that it can be difficult to prove "time's erosion of exculpatory evidence and testimony." *Doggett*, 505 U.S. at 655. Because a defendant's inability to prepare his case threatens "the fairness of the entire system" by undermining the reliability of the trial, *Barker*, 407 U.S. at 532, the Court has concluded that in some cases, it

is appropriate to presume prejudice even absent a showing that the delay affected "specific defenses" or evidence, *Doggett*, 505 U.S. at 655.

Relatedly, "[i]n light of the policies which underlie the right to a speedy trial," the "only possible remedy" for a Speedy Trial Clause violation is dismissal of the charges. *Strunk* v. *United States*, 412 U.S. 434, 440 (1973) (citation omitted). The Court has expressly rejected the possibility of remedying the violation by reducing the defendant's sentence by the time attributable to the unreasonable delay. *Id.* at 438. That remedy is insufficient because it assumes that the defendant is properly subject to punishment in the first place, by presuming that the trial was a reliable adjudication of guilt despite the delay. In addition, reducing the sentence would not address the infliction of unreasonably lengthy pretrial incarceration or anxiety, as those harms have already been fully felt by the time any speedy trial violation is found. *Id.* at 438-439.

3. The Due Process Clause protects defendants from delay that does not implicate the concerns of the Speedy Trial Clause

Because the Speedy Trial Clause is specifically directed to safeguarding the defendant's interests when facing unresolved charges, it does not guard against all possible prejudice that could result from delays during the criminal process. See *MacDonald*, 456 U.S. at 8. Rather, the Due Process Clause, not the Speedy Trial Clause, addresses potential prejudice to the defendant arising from delays that occur when charges are not pending. *Marion*, 404 U.S. at 324; see *MacDonald*, 456 U.S. at 8; *United States* v. *Lovasco*, 431 U.S. 783, 789 (1977) ("[T]he Due Process Clause

has a limited role to play in protecting against oppressive delay."). To establish a due process violation, the defendant must demonstrate "actual prejudice to the conduct of the defense" that is "substantial." *Marion*, 404 U.S. at 324-325; see, *e.g.*, *United States* v. *Shealey*, 641 F.3d 627, 633-634 (4th Cir.), cert. denied, 132 S. Ct. 320 (2011).

The requirement that the defendant demonstrate actual prejudice distinguishes the due process inquiry from the speedy trial inquiry, where prejudice may be presumed from an extended delay. Even though delays that occur before the defendant is subject to pending charges may prejudice the defendant's ability to defend himself, absent the restraints on liberty imposed by an accusation, the defendant must demonstrate that he has suffered actual prejudice from the delay. *MacDonald*, 456 U.S. at 8-9; *Marion*, 404 U.S. at 326.

B. The Speedy Trial Clause Does Not Apply To Delays That Occur After Conviction

Once the defendant has been convicted by his plea of guilty or the verdict of a jury, the concerns that animate the Speedy Trial Clause are no longer present. The defendant has been found guilty of the charged offense and therefore no longer enjoys the presumptive liberty interests that existed up to that point. And after conviction, the defendant's interest in avoiding the types of prejudice against which the Clause protects is significantly diminished.

1. Once the accusation against the defendant is resolved, the Speedy Trial Clause no longer applies

The criminal trial resolves the accusation against the defendant by determining whether he is innocent

or guilty. 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769) (Blackstone) (the trial has long been understood to require that "the truth of every accusation * * * be confirmed by the unanimous suffrage of twelve" jurors"); accord *Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000). Similarly, by pleading guilty, a defendant resolves the accusations against him by admitting his guilt of the charged crimes and waiving a jury determination on those charges. See *Libretti* v. *United States*, 516 U.S. 29, 38 (1995).

"Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged," or has validly pleaded guilty, "the presumption of innocence disappears." *District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009) (citation omitted). As a result, the defendant "proved guilty after a fair trial" or convicted on his plea "does not have the same liberty interests as a free man." *Id.* at 68. And the central purpose of the Speedy Trial Clause to protect the presumption of innocence in the face of an unresolved criminal accusation therefore no longer applies. Analysis of the consequences of delay thus shifts from the Speedy Trial Clause to the Due Process Clause, see pp. 32-33, *infra*, as it does for pre-accusation delay, see *Marion*, 404 U.S. at 323-324. This makes sense because the Speedy Trial Clause protects the accused, not the convicted.

Petitioner contends (Br. 16-17) that "this Court's public trial jurisprudence compels the conclusion that the Speedy Trial Clause applies to sentencing." While the two rights are textually intertwined, Pet. Br. 16, petitioner's conclusion does not follow from that prem-

ise. As an initial matter, the Court has not considered whether the Public Trial Clause applies to sentencing proceedings. See *In re Oliver*, 333 U.S. 257, 272-273 (1948) (discussing Sixth Amendment concerns by analogy where defendant's "charge, conviction and sentence" for criminal contempt were implemented in secret, without separately discussing sentencing).[2] And in any event, the various Sixth Amendment rights "protect different interests" and therefore may apply to different stages of the prosecution. *Gouveia*, 467 U.S. at 190. For example, the jury trial right—which is also textually intertwined with the Speedy Trial Clause—clearly does not apply to the many factual determinations made at sentencing, once the essential facts that determine the sentencing range are established at trial or by a plea. See *Blakely* v. *Washington*, 542 U.S. 296, 309 (2004). Similarly, in light of the purposes of the Speedy Trial Clause discussed above, that Clause does not apply to sentencing delay.

2. The interests that the Speedy Trial Clause protects are vitiated or diminished by the conviction

Once the defendant has been convicted, he has little or no interest in avoiding the forms of prejudice against which the Speedy Trial Clause protects.

a. Pretrial restraints on liberty

i. After a defendant has been found guilty and convicted, he no longer can assert any need to "prevent oppressive *pretrial* incarceration." *Barker*, 407

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[2] Whether the Public Trial Clause applies to sentencing would require analysis of the distinct interests protected by that Clause. See *Waller*, 467 U.S. at 46 (purposes include ensuring that judges act responsibly and that witnesses come forward).

U.S. at 532 (emphasis added). The valid adjudication of guilt dispels the pretrial concern that the government is imprisoning a defendant who may be found innocent. See *Delo* v. *Lashley*, 507 U.S. 272, 278 (1993) (per curiam) ("Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears."). As a result, a defendant convicted of an offense carrying a sentence of imprisonment has no liberty interest in avoiding that imprisonment: the conviction "extinguishe[s]" the defendant's "liberty right" to be free of punitive incarceration. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 464 (1981) (citation omitted).

Accordingly, the conviction vitiates any presumption that the defendant should be free pending sentencing. In fact, in the federal system, it gives rise to the opposite presumption: unlike a pretrial defendant, a convicted defendant whose sentence may include imprisonment is subject to immediate detention unless the court finds by clear and convincing evidence that he is unlikely to flee or present a danger. 18 U.S.C. 3143(a). Presumptive detention reflects that a convicted defendant has no recognized liberty interest in avoiding incarceration simply because his sentence has not yet been imposed.[3] Cf. *Murphy* v. *Hunt*, 455 U.S. 478, 481 n.5 (1982) (per curiam) (observing that a claim for "bail pending appeal" of a conviction is "quite distinct [from a] claim for bail by a presumptively innocent person awaiting trial").

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[3] The defendant will ordinarily be entitled to credit for time served for any period of post-conviction, pre-sentencing detention. See 18 U.S.C. 3585; see generally Arthur W. Campbell, *Law of Sentencing* § 9:28, at 444-451 (3d ed. 2004).

A convicted defendant thus does not have the sort of liberty interest that the Speedy Trial Clause protects. That is not to deny that in extreme cases of delay before sentencing, the length of a defendant's detention could exceed the sentence he would ultimately receive for the offense. See Pet. Br. 40. But the defendant's right to avoid that prejudice arises from due process, not speedy trial, principles. The liberty interest at stake there is the defendant's interest in being released after having served his sentence for his conviction, not the distinct interest in avoiding incarceration before having received any adjudication. See pp. 31-33, *infra*.

ii. While not contending that a convicted defendant has an entitlement to avoid incarceration altogether, petitioner contends (Br. 35-40) that lengthy pre-sentencing delays may harm a defendant's asserted interest in avoiding "oppressive" imprisonment—*i.e.*, confinement under conditions less favorable than those available after sentencing. Those deprivations do not implicate speedy trial concerns.

First, petitioner argues (Br. 35-38) that lengthy pre-sentencing detention may harm an interest in avoiding inferior conditions in local jails and in participating in rehabilitation programs not available in local jails. Petitioner relies (Br. 35-36) on *Barker*'s observation that "lengthy pretrial incarceration" in the poor conditions sometimes found in local jails is a concern of the Speedy Trial Clause. 407 U.S. at 532. The Court emphasized, however, that such a deprivation was "unfortunate" because the defendant could "ultimately [be] found to be innocent." *Id.* at 533. That concern does not apply here.

Once a defendant has been convicted, moreover, he does not have an entitlement to avoid conditions of confinement that do not otherwise violate the Constitution. See *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons," even though conditions may vary greatly from prison to prison. *Ibid.* For the same reason, a convicted prisoner lacks an entitlement to particular rehabilitation or other programs. See *Hewitt* v. *Helms*, 459 U.S. 460, 466-467 & n.4 (1983). The government may therefore impose the deprivations of which petitioner complains without establishing a justification for its decision or providing particular process. See *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976). It would be quite anomalous to hold that a convicted defendant who may be subject to those conditions as part of the sentence ultimately imposed has a speedy-trial-related interest in avoiding those very same conditions during any pre-sentencing incarceration.

Second, petitioner asserts (Br. 38-40) that a defendant who is already serving a sentence for an earlier conviction is prejudiced by time spent in a local jail, awaiting sentencing for a second conviction. Relying on *Smith* v. *Hooey*, 393 U.S. 374 (1969), petitioner asserts (Br. 38-39) that the inability to participate in rehabilitation programs in the local jail might affect the likelihood of obtaining parole on the first conviction. Putting aside the speculative nature of that contention, any adverse effect on a defendant's parole for a preceding conviction does not implicate speedy trial concerns because it does not arise from pending charges of which the defendant may be innocent.

Smith demonstrates as much. There, the Court explained that speedy trial concerns are implicated when a *pending* charge renders a defendant incarcerated on a separate conviction ineligible for parole on that conviction. 393 U.S. at 378. In that situation, the defendant would be harmed by unresolved charges of which he was presumptively innocent.

In the scenario petitioner posits, by contrast, the defendant has been *convicted* of the second charge. A second conviction may weigh heavily against a defendant's request for parole on an earlier conviction. See *Rutledge* v. *United States*, 517 U.S. 292, 302 (1996). It is therefore unlikely that sentencing delay would have an impact on the likelihood of parole that is separable from the legitimate impact of the second conviction itself.

b. Anxiety and concern

The Speedy Trial Clause guards against the "cloud of anxiety, suspicion, and often hostility" that is cast over a person accused of a crime of which he may turn out to be innocent. *Barker*, 407 U.S. at 533. That concern no longer exists after conviction.

Although petitioner is undoubtedly correct (Br. 44-46) that convicted defendants may be anxious about what sentence they will receive, that anxiety is different in kind from the anxiety with which the Speedy Trial Clause is concerned. A convicted defendant faces the certainty of the punishment and collateral consequences resulting from his conviction; the only question is how severe his sentence will be. Any anxiety is thus the direct and unavoidable result of his conviction. While a pre-sentencing delay extends the period of uncertainty, no concern exists that the de-

fendant should never have been subjected to that stress in the first place.

c. Impairment of the defense

Finally, the Speedy Trial Clause protects against impairment of the defense because that prejudice could damage the reliability of the trial, thereby undermining the presumption of innocence. See p. 11, *supra*. That concern is no longer present when the defendant's guilt has already been determined.

As petitioner asserts (Br. 41-44), an extended delay before sentencing might in some cases impair a defendant's ability to present testimony and evidence at sentencing. That prejudice does not, however, implicate the concerns addressed by the Speedy Trial Clause. The reliability of the determination of guilt or innocence is fundamental to the criminal system. Indeed, safeguarding the trial's reliability is so important that the Clause guards against *potential* impairment of the defense, even (in cases of egregious delay) when prejudice cannot be proved. See pp. 12-13, *supra*.

The sentencing proceeding involves a different set of determinations. Because the defendant's guilt has already been established, sentencing proceedings involve less formalized procedures and lower burdens of proof. See, *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 747 (1994) (noting that "sentencing process" is "less exacting than the process of establishing guilt"); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986) (traditionally there was no "prescribed burden of proof" at sentencing). The sentencing inquiry takes place within the boundaries established by the conviction: the facts of the offense necessary to establish the statutory maximum and minimum punishment

must have been proved at trial or admitted by the defendant. See *Alleyne*, 133 S. Ct. at 2158. While the sentencing court may conduct a wide-ranging inquiry to exercise its discretion within the statutory range, the convicted defendant enjoys no presumptive entitlement to leniency analogous to the presumption of innocence at trial.

Petitioner emphasizes (Br. 43) that when a defendant pleads guilty, the sentencing proceeding may be "the only point where fact disputes are adjudicated." But the factual disputes do not go to the fundamental question of guilt; they are geared instead to ascertaining the proper sentence within the statutory range. In addition, while historical evidence about the offense of conviction or other past conduct of the defendant may in cases of extreme delay become stale or be lost, evidence pertaining to present characteristics of the defendant (*e.g.*, character, acceptance of responsibility) is less likely to be adversely affected by delay. In view of both the nature of the proceeding and the nature of the issues to be adjudicated, sentencing delays do not implicate the core reliability concerns before a defendant is convicted to which the Speedy Trial Clause is addressed.

3. Applying the Speedy Trial Clause to sentencing delay would result in an unjustified windfall for the defendant

Because the purpose of the Speedy Trial Clause is to protect presumptively innocent defendants from the harms caused by an unresolved criminal charge, its framework is unsuited to addressing any prejudice caused by sentencing delays. Two aspects of that framework in particular would result in a windfall for convicted defendants.

First, to prevail on a Speedy Trial Clause claim, the defendant need not invariably make a particularized showing of prejudice. See *Doggett*, 505 U.S. at 655-656. While that approach may be appropriate to remedy pretrial delay that undermines a reliable determination of guilt and the liberty interests that exist before conviction, see pp. 12-13, *supra*, it has no place when the defendant has already been convicted. Restraints on liberty imposed before sentencing are unlikely to exceed those that can be imposed as a result of the conviction itself. And it is unlikely that pre-sentencing delay will sufficiently impair a defendant's sentencing defense to potentially affect the outcome, in view of the circumscribed nature of any fact-finding and the judge's discretion within the statutory range. Finding a speedy trial violation based on presumptive prejudice from pre-sentencing delay would risk granting relief in the absence of any real harm to the defendant.

Second, applying the "only possible remedy" for a Speedy Trial Clause violation—dismissal of the charges—in the context of sentencing delay would impose a societal cost completely disproportionate to the interests that would be served. *Strunk*, 412 U.S. at 440 (citation omitted). This Court has long "rejected the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence.'" *Bozza* v. *United States*, 330 U.S. 160, 166 (1947) (quoting *In re Bonner*, 151 U.S. 242, 260 (1894)). Dismissing the indictment to remedy sentencing delay would create precisely that scenario. Even assuming that the defendant suffered actual prejudice as a result of the sentencing

delay, that prejudice would not call into question the reliability of the adjudication of guilt—yet the defendant would receive the windfall of dismissal.

C. The Historical Understanding Of The Speedy Trial Right Supports The Conclusion That The Speedy Trial Clause Does Not Apply To Pre-Sentencing Delay

The right to a speedy trial arose out of the need to protect accused defendants against incarceration without an adjudication of guilt. Once the defendant had received that adjudication, he had no remaining liberty interest against incarceration during any interval between conviction and sentencing. The historical understanding of the speedy trial right thus supports the conclusion that the right does not apply to sentencing delay.

1. The historical purpose of the speedy trial right was to protect an accused whose innocence may be vindicated

a. From its origins, the right to a speedy trial was designed to protect accused individuals from lengthy detention without an adjudication of guilt. The "first articulation in modern jurisprudence" of the speedy trial right "appears to have been made in Magna Carta," which stated that "'we will not deny or defer to any man either justice or right.'" *Klopfer* v. *North Carolina*, 386 U.S. 213, 223 (1967) (quoting Magna Charta, 9 Hen. III, ch. 29 (1225), 1 Stat. at Large 7 (Ruffhead ed.)). Later, the Habeas Corpus Act, 31 Car.. 2, c. 2, 27 May 1679, provided for "the more speedy relief of all persons imprisoned for * * * criminal or supposed criminal matters" by requiring that a person "committed" on a charge and not tried within a certain time be released from imprisonment.

Ibid. As a leading criminal-law treatise explained in 1819, the principal "evil the [habeas] writ was chiefly intended to remedy[] is the neglect of the accuser to prosecute in due time." 1 J. Chitty, *A Practical Treatise on the Criminal Law* 88 (Chitty) (emphasis omitted).

Sir Edward Coke, whose works were widely read by the founding generation, explained that the Magna Carta, and later the Habeas Corpus Act, ensured that "the innocent shall not be worn and wasted by long imprisonment, but * * * speedily come to his trial[]." 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 315 (1797) (Coke); see *Klopfer*, 386 U.S. at 225. According to Coke, a precursor to the speedy trial right embodied in Magna Carta was a common-law writ known as *de odio et atia*, which permitted pretrial bail in order to "protect the innocent against false accusation" and "long imprisonment" before trial. Coke 42.

Petitioner observes (Br. 19-20) that Coke explained that Magna Carta and other early speedy trial protections reflected a concern that defendants receive "full and speedy justice, by due trial[]." Coke 43. In petitioner's view (Br. 18-22), that formulation demonstrates that the right extended to sentencing because "justice" can be understood to include punishment. That ignores the substance of Coke's discussion. Coke explained that Magna Carta ensured that "every subject of this realme, for injury done to him * * *, may take his remedy by course of law, *and have justice, and right for the injury done to him* * * * *speedily without delay*." Coke 55 (emphasis added). The primary "injury" with which Coke was concerned was "false imprisonment" and other pre-Magna Carta

abuses that prevented accused prisoners from challenging their confinement. *Id.* at 52; see *id.* at 52-55 (discussing writs used to challenge imprisonment without trial); *id.* at 43 (discussing pre-Magna Carta imprisonment without trial). That injury was remedied by by permitting an accused defendant to challenge his "detaining in prison without due trial[]." *Id.* at 43. Thus, while the trial would of course lead to punishment if the defendant were found guilty, a speedy trial was important because it provided the adjudication of guilt in the first place.

b. Coke's discussion of the speedy trial right was an important influence on the formulation of speedy trial provisions in colonial bills of rights and, eventually, the Sixth Amendment. *Klopfer*, 386 U.S. at 225 (noting that colonial provisions protecting a "speedy trial" echoed Coke's formulation). The evidence of the Framers' intent in adopting the speedy trial right is "meager." *Marion*, 404 U.S. at 315 n.6. But delegate Abraham Holmes emphasized that the right would protect against a scenario in which a person is "dragged from his home, his friends, his acquaintance, and confined in prison, until the next session of the court, * * * and after long, tedious, and painful imprisonment, though acquitted on trial, may have no possibility to obtain any kind of satisfaction for the loss of his liberty, the loss of his time, great expenses, and perhaps cruel sufferings." 2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 110 (2d ed. 1891).

The States similarly adopted speedy trial protections in their constitutions and laws. See *Klopfer*, 386

U.S. at 225-226. Nineteenth-century decisions focused on an accused's interest in vindication of the charges. See, *e.g.*, *Nixon* v. *State*, 10 Miss. (2 S. & M.) 497, 507 (1844) (noting that a defendant "shall not be unnecessarily hindered and delayed, in his efforts to relieve himself from the burden of an onerous charge of crime"); *Ex parte Santee*, 4 Va. (2 Va. Cas.) 363, 365 (1823) (stating that the purpose of speedy trial legislation was to "shield the accused from the consequences" of delay in prosecution); accord *id.* at 368 (Parker, J., dissenting) (stating that the speedy trial right "prevent[s] the long imprisonment of persons charged with crimes, because such persons * * * are presumed innocent, until their guilt is legally ascertained by a public and impartial trial"). Those authorities did not discuss post-guilt phase proceedings, because by then an accused person becomes a convicted one.

2. The trial resolved the accusation, and the sentencing was a distinct stage that did not always follow immediately upon conviction

a. When Founding-era authorities spoke of the speedy trial right's guarantee of a speedy resolution of an accusation, they were referring to the trial itself. At the Founding as now, the trial was the stage of the criminal proceeding in which "the truth of every accusation" is determined. Blackstone 343; see Chitty 481; accord *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2350 (2012). The "trial, in its origin, * * * charg[ed] the Jury to enquire into the truth of the charge against the prisoner." *State* v. *Lamon*, 10 N.C. (3 Hawks) 175, 178 (1824).

The sentencing was a distinct phase of the criminal proceeding. The trial stage closed with the jury's verdict. Chitty 437, 445. Blackstone explained that

"judgment" is "pronounced" only after "a person is convicted," Blackstone 356-357, and that the sentencing was the "next stage of criminal prosecution, after trial and conviction are past," *id.* at 368.[4]

b. That separation was not purely formal. Although, as petitioner asserts (Br. 24-26), the sentencing often followed closely upon conviction, that was not invariably the case. Bishop's criminal procedure treatise explained that the sentence "may be rendered instantly unless the practice of the court allows time for a motion in arrest of judgment, or some other step involving delay." 1 Joel Prentiss Bishop, *Criminal Procedure; or, Commentaries on the Law of Pleading and Evidence and the Practice in Criminal Cases* § 1291, at 767 (3d ed. 1880) (Bishop) (footnote omitted); see Blackstone 358 ("After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance."); Chitty 481 (sentence is usually pronounced immediately, but "the court may adjourn to another day"). As a result, "the court, for its own convenience, or on cause shown, [could] postpone[], as it commonly does, the sentence *to a future day or term.*" Bishop 767 (emphasis added; footnote omitted). Sentencing sometimes took place weeks or months after the conviction. See, *e.g.*, *People* v. *Felix*, 45 Cal. 163, 164

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[4] Petitioner cites (Br. 27-28) a few decisions and a docket entry containing statements to the effect that a defendant who was present in court between "arraignment and sentence, * * * was in court at every stage of the trial when her presence was needful." *State* v. *Outs*, 30 La. Ann. 1155, 1156 (1878). Those decisions, which concerned the defendant's right to be present for all stages of the proceeding, had no reason to consider whether the trial and sentencing were in fact distinct stages in the overall criminal proceeding.

(1872) (rejecting statutory claim that judgment must "be pronounced at the same term at which trial is had" and upholding sentence imposed seven months after conviction); *Williams* v. *Commonwealth*, 29 Pa. 102, 102 (1857) (defendant was convicted in May 1857 and sentenced in December 1857, after adjudication of new-trial motion).

During the interval between conviction and sentencing, the defendant presumptively would be imprisoned. "[B]etween conviction and judgment," the court would not "bail the offender without the consent of the prosecutor." Chitty 63; see *id.* at 456 ("If the defendant be in custody, or the crime be capital, he will of course be remanded to prison in the interval between conviction and sentence, if any be allowed to transpire."); *id.* at 457 (same, for misdemeanors). That pre-sentencing detention was understood to be closely related to the defendant's ultimate punishment: when a defendant was incarcerated before sentencing, "the length of his imprisonment will be considered by the court in deciding on the sentence." *Ibid.* The presumptive incarceration of convicted defendants indicates that Founding-era authorities understood that the defendant's liberty interest—an animating concern of the Speedy Trial Clause—dissipated upon conviction. Given the close historical relationship between the speedy trial and bail rights, see pp. 24-26, *supra*, it is unlikely that courts and other authorities would have viewed pre-sentencing incarceration as raising speedy trial concerns.

3. Petitioner offers no evidence that pre-sentencing delays were thought to implicate a right to speedy sentencing

Although sentencing delays—and pre-sentencing incarceration—sometimes occurred, petitioner has not identified (Br. 22-32) any decisions applying the Speedy Trial Clause to pre-sentencing delay—or even indicating that the pre-sentencing delay might implicate the right to a speedy trial.

Petitioner does cite (Br. 28) a few cases containing language that he views as favorable, but none of those decisions actually addressed a claim that a sentencing delay violated the right to a speedy trial. In *State* v. *Kreps*, 8 Ala. 951 (1846), the Alabama Supreme Court stated that a defendant should be permitted to agree to amendment of a deficient indictment in order to expedite trial proceedings, observing that even a guilty defendant might prefer to "have a speedy trial * * * [so] that the dreaded punishment be not long suspended." *Id.* at 955. That description of a defendant's possible reason for preferring a speedy trial does not suggest that delay between conviction and sentencing would implicate the speedy trial right. *Laverty* v. *Duplessis*, 3 Mart. (o.s.) *42 (1813), is similarly inapposite; there, the Louisiana Supreme Court cited the "great advantages resulting to the community from the speedy infliction of punishment, after the clear conviction" in support of its conclusion that it lacked jurisdiction over criminal appeals. *Id.* at *47-*48; see *Ely* v. *Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 74 (1820) (criminal, as opposed to civil, proceedings are those in which the government seeks to impose punishment).

D. The Due Process Clause And Statutory Provisions Protect Defendants Against Unreasonable Pre-Sentencing Delay

Although the Speedy Trial Clause does not apply to pre-sentencing delay, "other mechanisms" provide ample protection against unreasonable delays before sentencing. *Marion*, 404 U.S. at 322; see Pet. App. 15a-20a; see also *United States* v. *Ray*, 578 F.3d 184, 199-200 (2d Cir. 2009), cert. denied, 559 U.S. 1107 (2010).

1. Numerous federal and state statutes and rules provide protection against unreasonable sentencing delay. Cf. *Lovasco*, 431 U.S. at 789 (statutes of limitations provide the "primary" protection against excessive pre-indictment delay) (citations omitted). Federal Rule of Criminal Procedure 32(b)(1), for instance, requires the court to "impose sentence without unnecessary delay," and it sets forth default time limits governing presentence litigation.[5] Fed. R. Crim. P. 32; see *Juarez-Casares* v. *United States*, 496 F.2d 190, 191 (5th Cir. 1974) (vacating remaining sentence upon finding Rule 32(b)(1) violation). Most, if not all, States

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[5] In federal prosecutions, the median time between conviction and sentencing in 2014 was 99 days. U.S. Courts, *Table D-12—U.S. District Courts—Median Time from Conviction to Sentencing for Criminal Defendants Convicted During the 12-Month Period Ending September 30, 2014*, at 1 (Sept. 30, 2014), http://www.uscourts.gov/statistics/table/d-12/judicial-business/2014/09/30. During that interval, the probation officer conducts a presentence investigation and produces a PSR recommending an appropriate sentence. See 18 U.S.C. 3552(a); Fed. R. Crim. P. 32(c) and (d). The rules provide time periods for the parties to litigate the propriety of the PSR's recommendations and for the court to order additional investigation if appropriate. See generally 18 U.S.C 3552(b); Fed. R. Crim. P. 32.

have similar provisions. See, *e.g.*, N.Y. Crim. Proc. § 380.30(1) (McKinney 2005); Or. Rev. Stat. § 137.020 (2015).

2. In addition, this Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments have a "role to play in protecting against oppressive delay" that does not implicate the Speedy Trial Clause. *Lovasco*, 431 U.S. at 789 (pre-indictment delay); see *MacDonald*, 456 U.S. at 8 (delay after charges are initially dropped); pp. 13-14, *supra*. The Due Process Clause protects defendants from government action that "violates * * * fundamental conceptions of justice," including unreasonable pre-indictment delay that prejudices the defendant. *Lovasco*, 431 U.S. at 790 (citation and internal quotation marks omitted). As in the context of pre-indictment delay, therefore, a defendant may establish that pre-sentencing delay violates due process by showing (i) a constitutionally impermissible reason for the delay and (ii) actual prejudice.[6] *Ibid.*; *Marion*, 404 U.S. at 324; *Ray*, 578 F.3d at 199.

For two reasons, that inquiry is better suited to addressing sentencing delay than the traditional speedy trial framework. First, the requirement of actual prejudice ensures that only those defendants who have suffered a concrete deprivation will be entitled to relief. See pp. 22-23, *supra*. Petitioner's con-

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[6] This Court has not had occasion to elaborate on "the constitutional significance of various reasons for delay." *Lovasco*, 431 U.S. at 797. This case does not present such an occasion, as the content of the due process analysis is not fairly included within the question presented, and petitioner has not challenged the Montana Supreme Court's conclusion that petitioner failed to establish a due process violation. See Pet. i; Pet. Br. 48; Sup. Ct. R. 14.1(a).

tention (Br. 48) that the due process inquiry would be "inappropriate" because it would "give the defendant the burden to establish that he was prejudiced," is thus misplaced. That burden is necessary to ensure that the defendant has suffered actual harm that justifies the cost of whatever remedy the court imposes.

Second, while dismissal is the sole remedy available under the Speedy Trial Clause, see p. 13, *supra*, the Due Process Clause affords the flexibility to craft a remedy short of dismissal that is appropriate to the sentencing context. Courts may "fashion relief that counteracts the prejudice caused by the violation." *Ray*, 578 F.3d at 202. Potential remedies might include vacating the remaining sentence, see *ibid.*, or precluding the government from relying on a sentencing consideration (such as a leadership role in the offense) if the defendant demonstrates that his ability to disprove the relevant facts has been prejudiced by the delay.

3. Indeed, in order to apply the Speedy Trial Clause to pre-sentencing delay in a manner that avoids extreme and unjustified results, the Court would have to modify the speedy-trial analysis to resemble the due process framework. For the reasons discussed above, a sensible application of the Clause would require the defendant to demonstrate actual and substantial prejudice from the delay. See pp. 14, 22-24, *supra*. The paucity of petitioner's prejudice evidence illustrates the point. Petitioner asserts (Br. 51) that the Montana Supreme Court "improperly assigned [petitioner] the burden of proving prejudice" under the Speedy Trial Clause. In petitioner's view, the court should have found the necessary prejudice—despite the fact that he did not argue that the delay

had any effect on his ability to defend himself at sentencing—based solely on petitioner's unsupported assertions that conditions in the local jail were less favorable than those he would have enjoyed in prison. Pet. App. 22a (concluding petitioner's allegations were "speculative"). If petitioner is correct (Br. 51) that the court below "was obligated" under the Speedy Trial Clause "to credit" petitioner's assertions, speedy trial violations could be based on little more than a defendant's belief that being remanded to prison would be more advantageous—even when the defendant does not assert that the delay impaired his defense or caused any other actual prejudice.

In addition, as petitioner acknowledges (Br. 49), the rule that dismissal is the sole possible remedy for a Speedy Trial Clause violation would have to give way to more tailored remedies. See *United States* v. *Morrison*, 449 U.S. 361, 364 (1981) ("general rule" is that Sixth Amendment "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests"). Vacating a validly obtained conviction would be an absurdly disproportionate response to a delay in sentencing.

In sum, the Speedy Trial Clause analysis would have to be fundamentally altered to fit the sentencing context. The need for such doctrinal innovations is further proof that the Clause has never been understood to apply after conviction. And it shows that the sensible solution is simply to apply due process principles to claims of pre-sentencing delay. That framework appropriately requires defendants who are already subject to the deprivations authorized by the conviction to demonstrate actual prejudice. And it

gives courts flexibility to craft remedies designed to address the prejudice at issue in a particular case.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted.

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